No. 80-588

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

KRAMER MOTORS, INC., a California corporation,

Petitioner,

vs.

BRITISH LEYLAND, LTD., BRITISH LEYLAND INTERNATIONAL, LTD., and BRITISH LEYLAND MOTOR CORPORATION, LTD.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

JOHN R. SCHOEMER, JR.
NEIL J. ROSINI
405 Lexington Avenue
New York, New York 10174
Attorneys for Respondents

TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

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Kramer Motors, Inc., a California corporation,

Petitioner,

vs.

British Leyland, Ltd., British Leyland International, Ltd., and British Leyland Motor Corporation, Ltd.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

Statement of the Case

The relevant facts are sufficiently stated in the petition and in the opinion below. However, a brief word should be said about the related litigation between petitioner and the U.S. subsidiaries of respondents.

Petitioner is a retail dealer in imported automobiles in Santa Monica, California. The lines handled in 1973 included Volvo, Honda and Fiat, together with Triumph, manufactured in the United Kingdom by these respondents.

Seeking to consolidate its fragmented distribution and marketing, the British Leyland U.S. subsidiary adopted a "rationalization" program—approved by one of the respondents, as petitioner says—to consolidate wholesale distri-

bution. The new single distributor in southern California, which replaced three separate distributors, advised petitioner that when its Triumph franchise expired, the Triumph line would be moved to a nearby dealer who handled the other British Leyland marques (Jaguar and MG). Two lawsuits followed.

Kramer I. Petitioner first sued the U.S. members of the British Leyland Group, plus the new full-line distributor in southern California, plus the new retail dealer. It sought damages under the Automobile Dealers' Day in Court Act (15 U.S.C. § 1221) and the antitrust laws, primarily the Sherman Act (quoted in Appendix to Petition [hereafter "App."] 15). The action, filed in the Central District of California, was dismissed by the district court on summary judgment.

Kramer II. Petitioner then started a new action, involving the same facts but containing only antitrust claims, against the top U.K. companies in the British Leyland Group. That is this case, and respondents are those companies. The action was brought in San Diego, clearly to avoid being referred to the same judge in Los Angeles who had already dismissed Kramer I. The San Diego court dismissed Kramer II on the ground of lack of jurisdiction over the person of the foreign defendants (App. 2).

Both dismissals were appealed. In Kramer I, the Ninth Circuit reversed the dismissal *per curiam*, calling it "premature" in light of the decision of another panel of that court in a similar action brought by another discontinued Triumph dealer (App. 21). *Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429 (1979). Expressing "no opinion on the ultimate merits of the litigation" (App. 21), the court returned Kramer I to the district court in Los Angeles. A briefing and argument schedule has been set up, and it is likely that Kramer's claims will be resolved one

way or the other long before this Court could ever decide whether the antitrust claims may also be asserted against the U.K. companies.[1]

Reasons for Denying the Writ

Petitioner has not suggested any of the traditional grounds for granting certiorari. There is no claim of conflict among circuits, nor any claim that the Ninth Circuit decided the jurisdictional question in conflict with applicable decisions of this Court. A recital of district court antitrust decisions involving jurisdiction over foreign defendants, and the forecast that the decision below may create "confusion" (Pet. 13-14) do not meet the considerations listed in Rule 17.

Petitioner's assertion that the court below displayed undue "solicitousness" for the British defendants, at the sacrifice of "fairness" (Pet. 13), is unsupported. While petitioner speaks darkly of the mischief that will be abroad if foreign suppliers to the U.S. market are allowed a safe haven outside U.S. borders to violate U.S. antitrust laws at will, this is overblown rhetoric. It is not easy for this petitioner to convince anyone that the loss of the Triumph line—amounting to about 6% of its business[2]—was because of the machinations of a foreign automobile cartel.

Limiting this brief to the "Question Presented," we accept that the existence of U.S. companies to deal with, and

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[1] Kramer II (this case) has been transferred to Los Angeles by the San Diego court under 28 U.S.C. § 1404(a), so that if the jurisdictional dismissal is reversed, Kramer II will be heard by the same judge now preparing to hear Kramer I.

[2] In 1973 petitioner sold 429 Volvos, 192 Hondas, 187 Fiats and 54 Triumphs. In 1974, with Triumph moved to another dealer, Kramer added over 300 additional sales of its three other lines (Pltf's Interr. Ans. No. 3, 1 CT I 101).

if necessary respond to, petitioner's antitrust challenge is not alone a ground for refusing to accept jurisdiction over the foreign parents of the U.S. wrongdoers. But it is inappropriate, in view of the two cases that petitioner has been simultaneously pushing, to make it appear that petitioner will be turned away empty-handed unless the decision below is reversed.

ARGUMENT

A. It is constitutionally required that a defendant not "present" in the jurisdiction at least have "minimum contacts" before in personam jurisdiction may be established.

Such is the classic rule of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), requiring that the maintenance of a suit against foreign defendants shall not offend traditional notions of fair play and substantial justice (p. 316), and shall be "reasonable" (p. 317). Evaluation of the defendant's activity in the forum must not be mechanical or quantitative, but must be based upon a determination whether the "quality and nature of the activity in relation to the fair and orderly administration of the laws" (p. 319) allow *in personam* jurisdiction in accordance with due process requirements. See *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977). As the court below phrased it in its leading decision in the area, which it followed in this case:

> "If the defendant corporation has sufficient deliberate 'minimum contacts' with the forum state, a court may acquire *in personam* jurisdiction over it in actions which arise from those forum contacts. If, however, a corporation's activities in the forum are so 'continuous and systematic' that the corporation may in fact be said already to be 'present' there, it may also be served

in causes of action unrelated to its forum activities." *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977).

Even the district court decision relied upon by petitioner, *Energy Reserves Group, Inc.* v. *Superior Oil Co.*, 460 F.Supp. 483 (D.Kan. 1977), prefaces the discussion quoted by petitioner with references to "concepts of fundamental fairness and substantial justice" (p. 489) and the "fairness" of making the foreign defendant "defend itself in this forum" (p. 490). It is all very well to speak of "affiliating circumstances," but the threshold question always remains: Is it *fair* to make the defendant appear in this jurisdiction?

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980), was the basis for the motion for a rehearing below, on the ground that the court had overlooked or misapprehended the *World-Wide* decision. Much the same argument is repeated here. *World-Wide*, it is true, minimized the importance of inconvenience to the foreign defendant as a factor to be considered in a day of rapid travel and communications, but it reaffirmed traditional notions of fairness. How can it be unfair to this petitioner to deny it the right to drag in the British parent, when there are U.S. parties ready to appear and defend the action they took, and to pay damages if they are found to be wrong?

B. Petitioner has misread the decision below as requiring that a subsidiary be the alter ego of its parent in order to establish personal jurisdiction over the parent.

Petitioner asserts that the court held that "it was necessary that BLMI (U.S.) be the 'alter ego' of the British corporations" before personal jurisdiction over the latter could be established (Pet. 4, 8). It also contends that the court erroneously applied a quantitative rather than qual-

itative analysis in its consideration of defendants' ties with the forum (Pet. 5). Neither contention is borne out.

The opinion below first searched for any defendant's presence in the forum through an "agent" or "alter ego" (App. 5-6). It found none. Next, it looked for, and failed to find, any presence based upon the distribution of tractors, marine engines and double-decker buses by other companies within the British Leyland Group, *combined* with the presence of a subsidiary company in this country (App. 6-7).

Lastly, the opinion examined "minimum contacts" as a basis on which to premise jurisdiction. These would have to give rise to plaintiff's action to be relevant (App. 7). The panel observed that *one* defendant approved its U.S. subsidiary's marketing scheme, but concluded that so negligible an act would not constiute the "kind of deliberate forum-protection invoking act which the law requires." [3] The other two defendants did nothing at all which even arguably "gave rise to this cause of action."

There is no "logical imprecision" (Pet. 12) in the court's analysis. No defendant has any presence in the forum or any contact giving rise to plaintiff's cause of action; hence there exists no "minimum contact" or "affiliating circumstance," as plaintiff sometimes puts it,[4] on which to premise personal jurisdiction. There is no basis in law for any suggestion by petitioner that "minimum contacts" by a defendant corporation may be established by showing only

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[3] The court later added a citation to *World-Wide* at this point in its *per curiam* opinion (App. 11).

[4] Petitioner appears to suggest that a new notion of "affiliating circumstances" has succeeded *International Shoe's* requirement of "minimum contacts" (Pet. 6, 10, 12). Actually, the phrase "affiliating circumstances" first appeared in *Hanson* v. *Denckla*, 357 U.S. 235, 246 (1958), as a synonym for "minimum contacts." (It also appears with this meaning in Mr. Justice White's opinion in *World-Wide*, 444 U.S. at 295.)

that an "affiliated corporation" had contacts with the forum. The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is the sole owner of the subsidiary. *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 336-337 (1925); *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695, 699 (2d Cir. 1963), *cert. denied sub nom., Colbert* v. *Peerless Chemicals (P.R.) Inc.*, 375 U.S. 831 (1963); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980).

Even after aggregating the defendants' United States contacts for the purpose of deciding this case, the Court of Appeals concluded that there were insufficient contacts to support jurisdiction on any of plaintiff's theories (App. 5).[5]

CONCLUSION

It may be, as petitioner contends, that questions of jurisdiction of antitrust claims against foreign manufacturers selling their products in the U.S. may some day require resolution by this Court. Surely this is not the case in which that question is to be addressed.

Respectfully submitted,

JOHN R. SCHOEMER, JR.
NEIL J. ROSINI

Attorneys for Respondents

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[5] The panel aggregated the United States contacts only for the purpose of showing that even if it did so, as plaintiff urged, jurisdiction could not be established. The court did not reach the question whether aggregation was proper (App. 5 at n. 4).